

Bay Area Air Quality Management District Supplemental Environmental Projects Policy

INTRODUCTION

In order to protect and improve air quality and serve Bay Area citizens, the mission of the Bay Area Air Quality Management District is to address air quality violations with timely, quality enforcement actions that achieve compliance, result in improved air quality, and deter future violations. One way to improve air quality through enforcement actions is to obtain additional relief in the form of projects that prevent or remediate the adverse public health or environmental consequences of air pollution. Such projects may be included in settlement of an enforcement case in order to use opportunities afforded by the case to improve the environment beyond existing legal requirements. As part of the settlement, the size of the final cash penalty may be reduced by an amount paid to the Air District to fund, or a commitment of the violator to undertake, expenditures that are beneficial to air quality that are not otherwise required by law ("Supplemental Environmental Projects").

Even where conditions exist which justify the approval of a Supplemental Environmental Project ("SEP"), the Air District must still negotiate an adequate monetary penalty at a level consistent with California law and Air District Policy. It is solely within the Air District's enforcement discretion to approve or deny any SEP and to approve or deny any condition of a SEP.

A. USING THIS POLICY

Where a SEP is to be described in a settlement or funds collected for a SEP are to be committed, a proposed project must be examined to determine if it qualifies as a supplemental environmental project (SEP). In performing this evaluation, Air District Counsel in consultation with other Air District staff should use the following five-step process:

1. Ensure that the project meets the basic definition of SEP (Section B);
2. Ensure that all guidelines, including nexus, are satisfied (Section C);
3. Ensure that the project fits within one (or more) of the designated categories of SEPs (Section D);
4. Ensure that the cost of the project does not exceed more than 25 percent of the total settlement, exclusive of administrative costs (Section E);
5. Ensure that the project satisfies all of the implementation and other criteria (Sections F, G, and H).

B. DEFINITION AND KEY CHARACTERISTICS OF A SEP

Supplemental environmental projects (SEPs) are defined as projects beneficial to air quality which either (a) a defendant/respondent agrees to undertake in settlement of an enforcement action, but which the defendant/respondent is not otherwise legally required to perform; or (b) are funded by the Air District with funds collected and designated in settlements of enforcement cases for funding of SEPs.

The three key parts of this definition are elaborated as follows:

1. “Beneficial to air quality” means a SEP must improve, protect, or reduce risks to public health, or the environment at large through improvement of air quality. While in some cases a SEP may provide the alleged violator with certain benefits, there must be no doubt that the project primarily benefits the public health or the environment.
2. “In settlement of an enforcement action” means (a) Air District has the opportunity to help shape the scope of the project before it is implemented; and (b) the project is not commenced until after the Air District has identified a violation (e.g., issued a notice of violation, or filed a complaint).
3. “Not otherwise legally required to perform” means the SEP is not required by a federal, state, or local law or regulation. Further, SEPs cannot include actions that the defendant/respondent may be required to perform: (a) as injunctive relief in the instant case; (b) as part of a settlement or order in another legal action; or (c) by state or local requirements. SEPs may include activities that the defendant/respondent will become legally obligated to undertake two or more years in the future. Such accelerated compliance projects are not allowable, however, if the regulation or statute provides a benefit (e.g., a higher emission limit) to the defendant/respondent for early compliance.

In addition, performance of a SEP reduces neither the stringency nor timeliness requirements of applicable environmental statutes and regulations. Of course, performance of a SEP does not alter the defendant/respondent’s obligation to remedy a violation expeditiously and return to compliance.

C. LEGAL GUIDELINES

The Air District has broad discretion to settle cases, including the discretion to include SEPs as an appropriate part of the settlement. The legal evaluation of whether a proposed SEP is within the Air District’s authority and consistent with all statutory and constitutional requirements may be a complex task. Accordingly, this Policy uses certain legal guidelines to ensure that SEPs are within the Air District’s authority, and do not run afoul of any constitutional or statutory requirements.

1. All projects must have adequate nexus. Nexus is the relationship between the violation and the proposed project. This relationship exists only if the project remediates or reduces the probable overall environmental or public health impacts or risks to which the violation at issue contributes, or if the project is designed to reduce the likelihood that similar violations will occur in the future.
2. A project must advance at least one of the declared objectives of the environmental statutes or regulations that are the basis of the enforcement action.

D. CATEGORIES OF SUPPLEMENTAL ENVIRONMENTAL PROJECTS

The seven (7) categories of projects that may qualify as SEPs include: Public Health, Pollution Prevention, Pollution Reduction, Environmental Restoration and Protection, Environmental Compliance Audits, Comprehensive Environmental Training, and Emergency Planning and Preparedness. There may be other types of projects that meet the general criteria for SEPs and thus may be acceptable, but do not fall in these categories.

1. PUBLIC HEALTH

A public health project provides diagnostic, preventative and/or remedial components of human health care that is related to the actual or potential damage to human health caused by the

violation. This may include epidemiological data collection and analysis, medical examinations of potentially affected persons, collection and analysis of blood/fluid/tissue samples, medical treatment and rehabilitation therapy.

Public health SEPs are acceptable only where the primary benefit of the project is to the population that was harmed or put at risk by the violations.

2. POLLUTION PREVENTION

A pollution prevention project is one that reduces the generation of air pollution through source reduction, (i.e., any practice which reduces the amount of any hazardous substance, pollutant or contaminant being emitted into the air prior to recycling, treatment or disposal.) After the pollutant has been generated, pollution prevention is no longer possible, the pollutant must be handled by appropriate recycling, treatment, containment, or disposal methods.

Source reduction may include equipment or technology modifications, process or procedure modification, reformulation or redesign of products, substitution of raw materials, and improvements in housekeeping, maintenance, training, inventory control, or other operation and maintenance procedures. In-process recycling, wherein waste materials produced during a manufacturing process are returned directly to production as raw materials on site, is considered a pollution prevention project.

In all cases, for a project to meet the definition of pollution prevention, there must be an overall decrease in the amount and/or toxicity of pollution released into the air, not merely a transfer of pollution among media. This decrease may be achieved directly or through increased efficiency (conservation) in the use of energy, water, or other materials.

3. POLLUTION REDUCTION

If the pollutant or waste stream already has been generated or released, a pollution reduction approach, which employs recycling, treatment, containment or disposal techniques, may be appropriate. A pollution reduction project is one that results in a decrease in the amount and/or toxicity of any hazardous substance, pollutant or contaminant being emitted into the air by an operating business or facility by a means that does not qualify as pollution prevention. This may include the installation of more effective end-of-process control or treatment technology.

4. ENVIRONMENTAL RESTORATION AND PROTECTION

An environmental restoration and protection project is one that goes beyond repairing the damage caused by the violation to enhance the condition of the airshed adversely affected. Examples of such projects include: reductions in discharges of air pollutants that are not the subject of the violation in an affected air basin where the violation occurred, (e.g., in a case involving a reporting violation which did not directly, but potentially could, lead to damage due to unreported discharges).

With regard to man-made environments, such projects may involve the remediation of facilities and buildings provided such activities are not otherwise legally required. This includes the removal/mitigation of contaminated materials, such as soils, asbestos, or other materials, which are a continuing source of airborne releases and/or threat to individuals.

5. ENVIRONMENTAL COMPLIANCE AUDITS

Assessments and audits, if they are not otherwise available as injunctive relief, are potential SEPs under this category. There are four types of projects in this category.

A) Pollution Prevention Assessments

Pollution prevention assessments are systematic, internal reviews of specific processes and operations designed to identify and provide information about opportunities to reduce the use, production, and generation of contaminants, or toxic and hazardous materials, which may lead to air emissions. To be eligible as SEPs, such assessments must be conducted using a recognized or enhanced pollution prevention detection/assessment or waste minimization procedure to reduce the likelihood of future violations.

B) Site Assessments

Site assessments are investigations of the condition of the environment at a site or of the environment impacted by a site, and/or investigations of threats to human health or the environment relating to a site. These include, but are not limited to: investigations of levels and/or sources of air emissions at a site; investigations of discharges or emissions of air pollutants at a site whether from active operations or through passive transport mechanisms; ecological surveys relating to air emissions from a site; natural resource damage assessments relating to air emissions from a site; and risk assessments relating to air emissions from a site. To be eligible as SEPs, such assessments must be conducted in accordance with recognized protocols, if available, applicable to the type of assessment to be undertaken.

C) Environmental Management System Audits

An environmental management system audit is an independent evaluation of a defendant/respondent's environmental policies, practices and controls related to air emissions. Such evaluation may encompass the need for (1) a formal corporate environmental compliance policy and procedures for implementation of that policy; (2) educational and training programs for employees; (3) equipment purchase, operation and maintenance programs; (4) environmental compliance officer programs; (5) budgeting and planning systems for environmental compliance; (6) monitoring, record keeping and reporting systems; (7) in-plant and community emergency plans; (8) internal communications and control systems; and (9) hazard identification and risk assessment.

D) Environmental Compliance Audits

An environmental compliance audit is an independent evaluation of a defendant/respondent's compliance status with environmental requirements related to air emissions. Credit is only given for the costs associated with conducting the audit. While the SEP should require all violations discovered by the audit to be promptly corrected, no credit is given for remedying the violation since persons are required to achieve and maintain compliance with environmental requirements.

These two types of assessments and environmental management system audits are allowable as SEPs without an implementation commitment by the defendant/respondent. Implementation is not required because drafting implementation requirements before the results of the study are known is difficult. Further, for pollution prevention assessments and environmental management

systems audits, many of the implementation recommendations from these studies may constitute activities that are in the defendant/respondent's own economic interest.

6. COMPREHENSIVE ENVIRONMENTAL TRAINING

A Comprehensive Environmental Training project provides training or technical support to other members of the regulated community regarding air quality issues to: (a) identify, achieve and maintain compliance with applicable statutory and regulatory requirements; (b) avoid committing a violation with respect to such statutory and regulatory requirements; or (c) go beyond compliance by reducing the generation, release or disposal of air pollutants beyond legal requirements. For these types of projects, the defendant/respondent may lack the experience, knowledge or ability to implement the project itself, and, if so, the defendant/respondent should be required to contract with an appropriate expert to develop and implement the compliance promotion project. Acceptable projects may include, for example, producing or sponsoring a seminar directly related to correcting widespread or prevalent air emission violations within the defendant/respondent's economic sector.

Comprehensive Environmental Training SEPs are acceptable only where the primary impact of the project is focused on the same regulatory program requirements that were violated, and where the Air District has reason to believe that compliance in the sector would be significantly advanced by the proposed project.

7. EMERGENCY PLANNING AND PREPAREDNESS

An emergency planning and preparedness project provides assistance, such as computers and software, communication systems, chemical emission detection and inactivation equipment, HAZMAT equipment, or training, to a responsible or local emergency response or planning entity. This is to enable these organizations to fulfill their obligations under the Emergency Planning and Community Right-to-Know Act (EPCRA) to collect information to assess the dangers of hazardous chemicals present at facilities within their jurisdiction, to develop emergency response plans, to train emergency response personnel and to better respond to chemical spills and air emissions.

Emergency planning and preparedness SEPs are acceptable where the primary impact of the project is within the same emergency planning district affected by the violations. Further, this type of SEP is allowable only when the SEP involves non-cash assistance and there are violations involved in the enforcement case that resulted in an off-site release of hazardous air pollutants.

E. PROJECTS THAT ARE NOT ACCEPTABLE AS SEPS DESCRIBED IN SETTLEMENTS

Although the Air District may fund some such projects with funds collected and designated for expenditure on SEPs, the following are examples of the types of projects that are not allowable as SEPs when the SEP is in the form of a project described and committed to by the defendant/respondent in the settlement:

1. General education or public environmental awareness projects, e.g., sponsoring public seminars, conducting tours of environmental controls at a facility, or promoting recycling in a community;

2. Contribution to environmental research at a college or university;
3. Conducting a project, which, though beneficial to a community, is unrelated to environmental protection, e.g., making a contribution to charity, or donating playground equipment;
4. Studies or assessments without a commitment to implement the results (except as provided for in Section D.5, above).

F. EXTENT TO WHICH THE FINAL ASSESSED PENALTY CAN REFLECT A SUPPLEMENTAL ENVIRONMENTAL PROJECT

Although supplemental environmental projects may directly fulfill the Air District's goal of protecting and restoring air quality, there is an important countervailing enforcement goal that penalties should have the strongest possible deterrent effect upon the regulated community. In general, supplemental projects should be no more than 25 percent of the total settlement, exclusive of administrative costs.

G. OVERSIGHT AND DRAFTING ENFORCEABLE SEPS

If the SEP is in the form of a project to which the defendant/respondent has committed, the settlement agreement should completely and accurately describe the SEP. It should describe the specific actions to be performed by the defendant/respondent, and provide for a reliable and objective means to verify that the defendant/respondent has timely completed the project. This may require the defendant/respondent to submit periodic reports to the Air District. If an outside auditor is necessary to conduct this oversight, the defendant/respondent should be made responsible for the cost of any such activities. The defendant/respondent remains responsible for the quality and timeliness of any actions performed or any reports prepared or submitted by the auditor. A final report certified by an appropriate corporate official, acceptable to the Air Pollution Control Officer, and evidencing completion of the SEP, should be required.

To the extent feasible, defendants/respondents should be required to quantify the benefits associated with the project and provide the Air Pollution Control Officer with a report setting forth how the benefits were measured or estimated. The defendant/respondent should agree that whenever it publicizes a SEP or the results of the SEP, it will state in a prominent manner that the project is being undertaken as part of the settlement of an enforcement action with the Bay Area Air Quality Management District.

If the SEP consists of a portion of the settlement payment to be used by the Air District to fund a project, the settlement agreement should include a complete and accurate description of any appropriate restrictions on the use of the funds (e.g., geographical restrictions related to the area affected by the violation at issue).

H. FAILURE OF A SEP AND STIPULATED PENALTIES

If the SEP is in the form of a project to which the defendant/respondent has committed, the defendant/respondent should be required pursuant to the terms of the settlement document, to pay stipulated penalties for any failure of the SEP to be completed satisfactorily. The determination of whether the SEP has been satisfactorily completed (i.e., pursuant to the terms of the agreement) and whether the defendant/respondent has made a good faith, timely effort to implement the SEP is at the sole discretion of the Air District.

I. DOCUMENTATION AND CONFIDENTIALITY

In each case in which a SEP in the form of a project to which the defendant/respondent has committed is included as part of a settlement, an explanation of the SEP with supporting materials must be included as part of the case file. The explanation of the SEP should demonstrate that the five criteria set forth in Section A, above, are met by the project and include a description of the expected benefits associated with the SEP. The explanation must include a description by the enforcement attorney of how nexus and the other legal guidelines are satisfied.

Documentation and explanations of a particular SEP may constitute confidential settlement information that is exempt from disclosure under the California Public Records Act, is outside the scope of discovery, and is protected by various privileges, including the attorney-client privilege and the attorney work-product privilege.